

## **Senate Bill No. 143**

### **CHAPTER 221**

An act to amend Sections 6068 and 6085 of, to amend, repeal, and add Sections 6079.1 and 6086.65 of, and to add Section 6095.1 to, the Business and Professions Code, relating to attorneys.

[Approved by Governor July 28, 1999. Filed with  
Secretary of State July 28, 1999.]

#### **LEGISLATIVE COUNSEL'S DIGEST**

SB 143, Burton. Attorneys: discipline.

Existing law provides for disciplinary actions against attorneys.

Existing law imposes various duties on attorneys, including the duty to cooperate and participate in any disciplinary investigation or other regulatory or disciplinary proceeding pending against the attorney. However, existing law provides that this requirement shall not be construed to deprive an attorney of any privilege guaranteed by the Fifth Amendment to the Constitution of the United States or any other constitutional or statutory privileges.

This bill would also provide that this provision shall not be construed to require an attorney to cooperate with a request that requires the attorney to waive any constitutional or statutory privilege or to comply with a request for information or other matters within an unreasonable period of time in light of the time constraints of the attorney's practice. It would also provide that any exercise by an attorney of any constitutional or statutory privilege shall not be used against the attorney in a regulatory or disciplinary proceeding against him or her.

Existing law provides that an attorney complained against shall be given reasonable notice and opportunity to exercise various defense rights.

This bill would require the notice and opportunity to also be fair and adequate, and would specify that the rights include the right to exercise any right guaranteed by the State Constitution or the United States Constitution, including the right against self-incrimination.

The bill would also require the State Bar to compile specified disciplinary statistics relating to who is prosecuted, and to issue a written report on or before June 30, 2001, to the Senate and Assembly Judiciary Committees. The bill would provide that procedures used in the disciplinary process shall ensure that resources of the State Bar are used fairly and equitably in the investigation and prosecution of complaints against all attorneys. It would also provide, as specified, that disciplinary proceedings shall not be brought in disproportionate numbers against attorneys practicing as solo practitioners or in small

law firms, as defined, or partnerships, as compared to proceedings brought against attorneys practicing in large law firms. It would prohibit the report from being used as a defense or mitigating factor in any disciplinary proceeding against an attorney.

Existing law requires the Supreme Court to appoint to the State Bar Court a presiding judge, no fewer than 7 hearing judges, and any additional judges as may be authorized by the Legislature.

This bill instead would require, as of November 1, 2000, that the Supreme Court appoints the presiding judge to the State Bar Court and that 5 hearing judges also be appointed, 2 of whom would be appointed by the Supreme Court, one by the Governor, one by the Senate Committee on Rules, and one by the Speaker of the Assembly.

Existing law establishes a Review Department of the State Bar Court that consists of, among others, one Lay Judge and one Review Department Judge.

This bill instead would provide, as of November 1, 2000, for 2 Review Department Judges appointed by the Supreme Court. The bill also would revise the provision authorizing the Board of Governors to provide a rule regarding the review of decisions other than decisions issued by the Review Department of the State Bar Court.

The bill additionally would make technical conforming changes.

*The people of the State of California do enact as follows:*

SECTION 1. Section 6068 of the Business and Professions Code is amended to read:

6068. It is the duty of an attorney to do all of the following:

- (a) To support the Constitution and laws of the United States and of this state.
- (b) To maintain the respect due to the courts of justice and judicial officers.
- (c) To counsel or maintain such actions, proceedings, or defenses only as appear to him or her legal or just, except the defense of a person charged with a public offense.
- (d) To employ, for the purpose of maintaining the causes confided to him or her such means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law.
- (e) To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.
- (f) To abstain from all offensive personality, and to advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he or she is charged.
- (g) Not to encourage either the commencement or the continuance of an action or proceeding from any corrupt motive of passion or interest.



(h) Never to reject, for any consideration personal to himself or herself, the cause of the defenseless or the oppressed.

(i) To cooperate and participate in any disciplinary investigation or other regulatory or disciplinary proceeding pending against the attorney. However, this subdivision shall not be construed to deprive an attorney of any privilege guaranteed by the Fifth Amendment to the Constitution of the United States or any other constitutional or statutory privileges, nor shall this subdivision be construed to require an attorney to cooperate with a request that requires the attorney to waive any constitutional or statutory privilege or to comply with a request for information or other matters within an unreasonable period of time in light of the time constraints of the attorney's practice. Any exercise by an attorney of any constitutional or statutory privilege shall not be used against the attorney in a regulatory or disciplinary proceeding against him or her.

(j) To comply with the requirements of Section 6002.1.

(k) To comply with all conditions attached to any disciplinary probation, including a probation imposed with the concurrence of the attorney.

(l) To keep all agreements made in lieu of disciplinary prosecution with the agency charged with attorney discipline.

(m) To respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services.

(n) To provide copies to the client of certain documents under time limits and as prescribed in a rule of professional conduct which the board shall adopt.

(o) To report to the agency charged with attorney discipline, in writing, within 30 days of the time the attorney has knowledge of any of the following:

(1) The filing of three or more lawsuits in a 12-month period against the attorney for malpractice or other wrongful conduct committed in a professional capacity.

(2) The entry of judgment against the attorney in any civil action for fraud, misrepresentation, breach of fiduciary duty, or gross negligence committed in a professional capacity.

(3) The imposition of any judicial sanctions against the attorney, except for sanctions for failure to make discovery or monetary sanctions of less than one thousand dollars (\$1,000).

(4) The bringing of an indictment or information charging a felony against the attorney.

(5) The conviction of the attorney, including any verdict of guilty, or plea of guilty or no contest, of any felony, or any misdemeanor committed in the course of the practice of law, or in any manner such that a client of the attorney was the victim, or a necessary element of which, as determined by the statutory or common law definition

of the misdemeanor, involves improper conduct of an attorney, including dishonesty or other moral turpitude, or an attempt or a conspiracy or solicitation of another to commit a felony or any such misdemeanor.

(6) The imposition of discipline against the attorney by any professional or occupational disciplinary agency or licensing board, whether in California or elsewhere.

(7) Reversal of judgment in a proceeding based in whole or in part upon misconduct, grossly incompetent representation, or willful misrepresentation by an attorney.

(8) As used in this subdivision, “against the attorney” includes claims and proceedings against any firm of attorneys for the practice of law in which the attorney was a partner at the time of the conduct complained of and any law corporation in which the attorney was a shareholder at the time of the conduct complained of unless the matter has to the attorney’s knowledge already been reported by the law firm or corporation.

(9) The State Bar may develop a prescribed form for the making of reports required by this section, usage of which it may require by rule or regulation.

(10) This subdivision is only intended to provide that the failure to report as required herein may serve as a basis of discipline.

SEC. 2. Section 6079.1 of the Business and Professions Code is amended to read:

6079.1. (a) The Supreme Court shall appoint a presiding judge of the State Bar Court and no fewer than seven hearing judges, and any additional hearing judges as may be authorized by the Legislature, to efficiently decide any and all regulatory matters pending before the Hearing Department of the State Bar Court. The presiding judge and all other judges of that department shall be appointed for a term of six years and may be reappointed for additional six-year terms. Any judge appointed under this section shall be subject to admonition, censure, removal, or retirement by the Supreme Court upon the same grounds as provided for judges of courts of record of this state.

(b) Judges of the State Bar Court appointed under this section shall not engage in the private practice of law. The State Bar Court shall be broadly representative of the ethnic, sexual, and racial diversity of the population of California and composed in accordance with Sections 11140 and 11141 of the Government Code. Each judge:

(1) Shall have been a member of the State Bar for at least five years.

(2) Shall not have any record of the imposition of discipline as an attorney in California or any other jurisdiction.

(3) Shall meet such other requirements as may be established by subdivision (d) of Section 12011.5 of the Government Code.

(c) The board shall screen and rate all applicants for appointment or reappointment as a State Bar Court judge and submit its recommendations to the appointing authority, unless otherwise directed by the appointing authority. The board shall hold hearings and allow public comment on the qualifications of recommended nominees submitted to the appointing authority. Written comment received by the board and any hearing record shall be transmitted to the appointing authority together with its recommendations. The board shall grant a preference to persons with prior judicial experience, and submit no fewer than three recommendations for each available judicial position.

(d) For judges appointed pursuant to this section or Section 6086.65, the board shall fix and pay reasonable compensation and expenses and provide adequate supporting staff and facilities. Hearing judges shall be paid the same salary as municipal court judges. The presiding judge shall be paid the same salary as a superior court judge.

(e) From among the members of the State Bar or retired judges, the board may appoint pro tempore judges to decide matters in the Hearing Department of the State Bar Court when a judge of the State Bar is unavailable to serve without undue delay to the proceeding. The board may set the qualifications, terms, and conditions of service for pro tempore judges and may, in its discretion, compensate some or all of them out of funds appropriated by the board for this purpose.

(f) The board may fix a date no later than September 1, 1989, on which all proceedings pending before the Hearing Department of the State Bar Court shall be decided by a judge or pro tempore judge appointed under this section. From and after that date, a judge or pro tempore judge appointed under this section shall hear every regulatory matter pending in the Hearing Department of the State Bar Court as to which the taking of testimony or offering of evidence at trial has not commenced, and when so assigned, shall sit as the sole adjudicator, except for rulings which are to be made by the presiding judge of the State Bar Court or referees of other departments of the State Bar Court.

(g) Any judge or pro tempore judge of the State Bar Court as well as any employee of the State Bar assigned to the State Bar Court shall have the same immunity which attaches to judges in judicial proceedings in this state. Nothing in this subdivision limits or alters the immunities accorded the State Bar, its officers and employees, or any judge or referee of the State Bar Court as they existed prior to January 1, 1989. This subdivision does not constitute a change in, but is cumulative with, existing law.

(h) Nothing in this section shall be construed to prohibit the board from appointing persons to serve without compensation to arbitrate fee disputes under Article 13 (commencing with Section 6200) of this chapter or to monitor the probation of a member of the State Bar,



whether those appointed under Section 6079, as added by Chapter 1114 of the Statutes of 1986, serve in the State Bar Court or otherwise.

(i) Any retired judge or referee appointed under Section 6079, as added by Chapter 1114 of the Statutes of 1986, prior to July 1, 1989, or any other authority may continue on or after July 1, 1989, to exercise the duties and powers authorized by that section or of the referee's appointment as to any matter assigned to him or her unless the matter has been reassigned under subdivision (f).

(j) This section shall cease to be operative on November 1, 2000, and as of that date is repealed, unless a later enacted statute, that is enacted before November 1, 2000, deletes or extends that date.

SEC. 3. Section 6079.1 is added to the Business and Professions Code, to read:

6079.1. (a) The Supreme Court shall appoint a presiding judge of the State Bar Court. In addition, five hearing judges shall be appointed, two by the Supreme Court, one by the Governor, one by the Senate Committee on Rules, and one by the Speaker of the Assembly, to efficiently decide any and all regulatory matters pending before the Hearing Department of the State Bar Court. The presiding judge and all other judges of that department shall be appointed for a term of six years and may be reappointed for additional six-year terms. Any judge appointed under this section shall be subject to admonition, censure, removal, or retirement by the Supreme Court upon the same grounds as provided for judges of courts of record of this state.

(b) Judges of the State Bar Court appointed under this section shall not engage in the private practice of law. The State Bar Court shall be broadly representative of the ethnic, sexual, and racial diversity of the population of California and composed in accordance with Sections 11140 and 11141 of the Government Code. Each judge:

(1) Shall have been a member of the State Bar for at least five years.

(2) Shall not have any record of the imposition of discipline as an attorney in California or any other jurisdiction.

(3) Shall meet such other requirements as may be established by subdivision (d) of Section 12011.5 of the Government Code.

(c) The board shall screen and rate all applicants for appointment or reappointment as a State Bar Court judge and submit recommendations to the appointing authority, unless otherwise directed by the appointing authority. The board shall hold hearings and allow public comment on the qualifications of recommended nominees submitted to the appointing authority. Written comment received by the board and any hearing record shall be transmitted to the appointing authority together with its recommendations. The board shall grant a preference to persons with prior judicial experience, and submit no fewer than three recommendations for each available judicial position.

(d) For judges appointed pursuant to this section or Section 6086.65, the board shall fix and pay reasonable compensation and expenses and provide adequate supporting staff and facilities. Hearing judges shall be paid the same salary as municipal court judges. The presiding judge shall be paid the same salary as a superior court judge.

(e) From among the members of the State Bar or retired judges, the board may appoint pro tempore judges to decide matters in the Hearing Department of the State Bar Court when a judge of the State Bar is unavailable to serve without undue delay to the proceeding. The board may set the qualifications, terms, and conditions of service for pro tempore judges and may, in its discretion, compensate some or all of them out of funds appropriated by the board for this purpose.

(f) The board may fix a date no later than September 1, 1989, on which all proceedings pending before the Hearing Department of the State Bar Court shall be decided by a judge or pro tempore judge appointed under this section. From and after that date, a judge or pro tempore judge appointed under this section shall hear every regulatory matter pending in the Hearing Department of the State Bar Court as to which the taking of testimony or offering of evidence at trial has not commenced, and when so assigned, shall sit as the sole adjudicator, except for rulings which are to be made by the presiding judge of the State Bar Court or referees of other departments of the State Bar Court.

(g) Any judge or pro tempore judge of the State Bar Court as well as any employee of the State Bar assigned to the State Bar Court shall have the same immunity which attaches to judges in judicial proceedings in this state. Nothing in this subdivision limits or alters the immunities accorded the State Bar, its officers and employees, or any judge or referee of the State Bar Court as they existed prior to January 1, 1989. This subdivision does not constitute a change in, but is cumulative with, existing law.

(h) Nothing in this section shall be construed to prohibit the board from appointing persons to serve without compensation to arbitrate fee disputes under Article 13 (commencing with Section 6200) of this chapter or to monitor the probation of a member of the State Bar, whether those appointed under Section 6079, as added by Chapter 1114 of the Statutes of 1986, serve in the State Bar Court or otherwise.

(i) Any retired judge or referee appointed under Section 6079, as added by Chapter 1114 of the Statutes of 1986, prior to July 1, 1989, or any other authority may continue on or after July 1, 1989, to exercise the duties and powers authorized by that section or of the referee's appointment as to any matter assigned to him or her unless the matter has been reassigned under subdivision (f).

(j) This section shall become operative on November 1, 2000.

SEC. 4. Section 6085 of the Business and Professions Code is amended to read:



6085. Any person complained against shall be given fair, adequate, and reasonable notice and have a fair, adequate, and reasonable opportunity and right:

- (a) To defend against the charge by the introduction of evidence.
- (b) To receive any and all exculpatory evidence from the State Bar after the initiation of a disciplinary proceeding in State Bar Court, and thereafter when this evidence is discovered and available. This subdivision shall not require the disclosure of mitigating evidence.
- (c) To be represented by counsel.
- (d) To examine and cross-examine witnesses.
- (e) To exercise any right guaranteed by the State Constitution or the United States Constitution, including the right against self-incrimination.

He or she shall also have the right to the issuance of subpoenas for attendance of witnesses to appear and testify or produce books and papers, as provided in this chapter.

SEC. 5. Section 6086.65 of the Business and Professions Code is amended to read:

6086.65. (a) There is a Review Department of the State Bar Court, which consists of the Presiding Judge of the State Bar Court, one Lay Judge, and one Review Department Judge. The judges of the Review Department shall be nominated, appointed, and subject to discipline as provided by subdivision (a) of Section 6079.1, shall be qualified as provided by subdivision (b) of Section 6079.1, and shall be compensated as provided for the Presiding Judge by subdivision (d) of Section 6079.1. However, the Lay Judge, who shall be a person who has never been a member of the State Bar or admitted to practice law before any court in the United States, and the Review Department Judge may be appointed to, and paid as, positions occupying one-half the time and pay of the Presiding Judge. Candidates shall be rated and screened by the board as provided in subdivision (c) of Section 6079.1.

(b) The board may fix a date no later than September 1, 1989, on which all proceedings pending before the Review Department shall be decided by judges of the Review Department appointed under this section. The Review Department in existence on June 30, 1989, may continue on and after July 1, 1989, to exercise the duties and powers under prior Section 6086.6 as to any matter assigned to it prior to the date set by the board pursuant to this section.

(c) The Presiding Judge of the State Bar Court shall appoint an Executive Committee of the State Bar Court of no fewer than seven persons, including one person who has never been a member of the State Bar or admitted to practice law before any court in the United States. The Executive Committee may adopt rules of practice for the operation of the State Bar Court as provided in Section 6086.5.

(d) Any decision or order reviewable by the Review Department and issued by a judge of the State Bar Court appointed pursuant to



Section 6079.1 may be reviewed only upon timely request of a party to the proceeding and not on the Review Department's own motion. Unless otherwise provided by a rule of practice or procedure approved by the Supreme Court, the party requesting review shall have the burden of showing one of the following:

(1) The Hearing Department did not proceed in the manner required by law.

(2) The findings of the Hearing Department are not supported by substantial evidence.

(3) The decision or recommendation of the Hearing Department is clearly erroneous.

(e) This section shall cease to be operative on November 1, 2000, and as of that date is repealed, unless a later enacted statute, that is enacted after November 1, 2000, deletes or extends that date.

SEC. 6. Section 6086.65 is added to the Business and Professions Code, to read:

6086.65. (a) There is a Review Department of the State Bar Court, that consists of the Presiding Judge of the State Bar Court and two Review Department Judges appointed by the Supreme Court. The judges of the Review Department shall be nominated, appointed, and subject to discipline as provided by subdivision (a) of Section 6079.1, shall be qualified as provided by subdivision (b) of Section 6079.1, and shall be compensated as provided for the Presiding Judge by subdivision (d) of Section 6079.1. However, the two Review Department Judges may be appointed to, and paid as, positions occupying one-half the time and pay of the Presiding Judge. Candidates shall be rated and screened by the board as provided in subdivision (c) of Section 6079.1.

(b) The board may fix a date no later than September 1, 1989, on which all proceedings pending before the Review Department shall be decided by judges of the Review Department appointed under this section. The Review Department in existence on June 30, 1989, may continue on and after July 1, 1989, to exercise the duties and powers under prior Section 6086.6 as to any matter assigned to it prior to the date set by the board pursuant to this section.

(c) The Presiding Judge of the State Bar Court shall appoint an Executive Committee of the State Bar Court of no fewer than seven persons, including one person who has never been a member of the State Bar or admitted to practice law before any court in the United States. The Executive Committee may adopt rules of practice for the operation of the State Bar Court as provided in Section 6086.5.

(d) Any decision or order reviewable by the Review Department and issued by a judge of the State Bar Court appointed pursuant to Section 6079.1 may be reviewed only upon timely request of a party to the proceeding and not on the Review Department's own motion. Unless otherwise provided by a rule of practice or procedure

approved by the Supreme Court, the party requesting review shall have the burden of showing one of the following:

(1) The Hearing Department did not proceed in the manner required by law.

(2) The findings of the Hearing Department are not supported by substantial evidence.

(3) The decision or recommendation of the Hearing Department is clearly erroneous.

(e) This section shall become operative on November 1, 2000.

SEC. 7. Section 6095.1 is added to the Business and Professions Code, to read:

6095.1. (a) Beginning on April 1, 2000, and through March 31, 2001, the State Bar shall compile statistics indicating the number of complaints against attorneys, broken down to reflect the percentage of complaints brought against attorneys practicing as solo practitioners, in small law firms or partnerships, and in large law firms. The State Bar shall also compile statistics indicating the percentage of complaints that are investigated, the percentage of complaints that are prosecuted, and the outcomes of those prosecutions against solo practitioners, attorneys practicing in small law firms or partnerships, and attorneys practicing in large law firms. For the purposes of the study, agreements in lieu of discipline shall not be counted as prosecutions. Practicing attorneys shall provide any information that is requested by the bar deemed necessary for the purpose of compiling the statistics. For purposes of this section, "small law firm" means a firm, partnership, association, corporation, or limited liability partnership that includes 10 or fewer attorneys.

(b) On or before June 30, 2001, the State Bar shall issue a written report to the Senate Committee on Judiciary and the Assembly Committee on Judiciary on procedures used in the disciplinary process to ensure that resources of the State Bar are used fairly and equitably in the investigation and prosecution of complaints against attorneys. In particular, the report shall focus on whether disciplinary proceedings are brought in disproportionate numbers against attorneys practicing as solo practitioners or in small law firms or partnerships, as compared to proceedings brought against attorneys practicing in large law firms. The report shall also describe any procedures in place or under consideration to correct any institutional bias and shall include a discussion of, and recommendations regarding, any additional changes to the discipline process that would make it more equitable. In particular, the State Bar shall consider disciplinary avenues other than the investigation and prosecution of complaints against attorneys. After issuing the report, the State Bar shall continue to compile and maintain statistics pursuant to subdivision (a), and shall make those statistics available to the public upon request.

(c) Procedures used in the disciplinary process shall ensure that resources of the State Bar are used fairly and equitably in the investigation and prosecution of complaints against all attorneys. Disciplinary proceedings shall not be brought in disproportionate numbers against attorneys practicing as solo practitioners or in small law firms or partnerships, as compared to proceedings brought against attorneys practicing in large law firms, unless the number of complaints against solo practitioners, or attorneys practicing in small law firms or partnerships, is commensurate with the higher number of disciplinary proceedings.

(d) The report of the State Bar prepared pursuant to this section shall not be used as a defense or mitigating factor in any disciplinary proceeding against an attorney.

